Comments on House Bill 5089

Submitted by
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Thank you for the opportunity to comment on House Bill 5089 which would modify our current DNA testing statute, MCL 770.16. MCL 770.16 has a number of problems that House Bill 5089 would fix:

The Problem: Currently, under Sec. 16 (1), only those serving a prison sentence may file a petition for DNA testing. There are cases in which an individual has completed serving his sentence but still desires to prove his innocence.

In most instances, the consequences of a conviction are great. Exonerees released from prison often have difficulty finding jobs and housing and often have trouble in relationships due to trust issues. If convicted of a sex crime, they are required to register as a sex offender. Most troubling, the criminal investigations in these cases have stopped and the real perpetrator of the crime may be at large.

The Solution: Section 16 (1) will be modified under House Bill 5089 to allow individuals on probation or parole, or individuals who have completed serving their sentence to file a petition for post-conviction DNA testing. This modification will bring Michigan in line with the 17 states that currently allow for post-conviction DNA testing after an individual's release from prison.

The Problem: Currently, under Sec. 16(1), only individuals convicted "at trial" may file a post-conviction petition for DNA testing. Meaning, if an individual plead guilty, that individual is not entitled to bring a petition under the current statute. Of the 208 exonerations nationwide, nearly 25% of those exonerated through DNA testing confessed or admitted to crimes they did not commit. Studies have shown that people admit to crimes and even plead guilty for a variety of reasons: some were offered reduced sentences in exchange for guilty pleas, while others were intimidated by law enforcement and defense counsel or were mentally impaired. Individuals who admitted to crimes they did not commit would still be in prison today if they had been denied DNA testing. Again, if the individual is innocent, it is in the best interest of society for law enforcement to investigate and to find the real perpetrator of the crime.

The Solution: Section 16 (1) will be modified under House Bill 5089 to include individuals who plead guilty as those who may bring a petition for post-conviction DNA testing. This modification will bring Michigan up to par with the 37 states, out of the 42 states (plus D.C.), that allow for post-convictions testing in guilty plea cases.

The Problem: Section 16(1) contains a sunset provision of January 1, 2009. This means that anyone intending to file a post-conviction petition for DNA testing must do so by that date. The idea behind this provision was to create finality in the cases that could be

brought under the statute. Finality should not trump innocence (there is no true finality when the actual perpetrator remains free, creating new victims).

The Innocence Project is still investigating cases and new cases are coming in every day. These cases will not be investigated and ready to file by that date. Additionally, DNA testing technology is rapidly improving which will result in more cases falling under the statute in the future. Just in the last two years, Y-STR testing has been introduced and affords the possibility of results where results were inconclusive in the past. Because DNA testing technology is rapidly improving, there should not be a sunset provision in the statute.

The Solution: Section 16(1) will be modified under House Bill 5089 to eliminate the sunset provision. Currently, only 8 other states (AR, CT, DE, GA, ID, LA, MN, and OH) out of the 42 (plus D.C.) states with post-conviction DNA testing statutes have sunset provisions. Modifying this section of the statute will bring Michigan more in line with the rest of the nation.

The Problem: Section 16(1) requires that an individual be convicted prior to January 8, 2001 (the effective date of MCL 770.16) to bring a post-conviction petition for DNA testing. The original thought on this provision was that those convicted after the effective date of the statute would get DNA testing at the time of trial, if requested. Our experience has shown that this is not occurring for a number of reasons: defendant was indigent and did not have the money to pay for testing; defense counsel was ineffective and did not ask for testing; court disagreed with the materiality of the items requested tested; or testing was done, but was inconclusive and testing now might produce a conclusive result. DNA technology is constantly evolving; restricting access to post-conviction requests for DNA testing only to those convicted before the effective date of January 8, 2001 will lead to innocent people being time-barred

The Solution: This provision from section 16(1) restricting post-conviction DNA testing to those convicted before January 8, 2001 and will be eliminated under House Bill 5089.

The Problem: Section 16(8) states that "upon motion of the prosecutor, the court shall order retesting . . . and shall stay the defendant's motion for a new trial pending the results of the DNA retesting." In many of our cases, there is only a small amount of biological evidence remaining in the case. Often times, there is not enough to test twice and it is unclear whether the defendant's motion could be stayed indefinitely as a result. This section also does not provide the defendant an opportunity to motion for retesting should results of testing be favorable to the prosecution.

The Solution: Section 16 (8) will be modified under section 16 (12) of House Bill 5089 to read "[I]f there is a sufficient biological sample, upon motion of the prosecuting attorney or the individual, the court shall order retesting . . . and shall stay the individual's motion for a new trial pending the results of the DNA retesting. If there is not sufficient biological material for additional testing, the parties shall be notified of that fact before any test is conducted and shall be provided the opportunity to have an expert present during any test that is conducted."

The Problem: While MCL 770.16 puts the burden on the individual of discovering whether biological evidence is still available, it does not offer a tool for that purpose. Currently, there is nothing that requires a law enforcement agency to give such information to an individual. The Innocence Project has a large number of cases where it has been difficult, if not impossible, to determine whether biological evidence is still available due to lack of cooperation from law enforcement, prosecutors, medical examiner's offices, and courts.

The Solution: Section 16 (5) of House Bill 5089 adds a provision that states that inquiries related to the whereabouts of biological evidence shall be answered within 28 days.

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Facts on Post-Conviction DNA Exonerations

There have been 208 post-conviction DNA exonerations in the United States.

• The first DNA exoneration took place in 1989. Exonerations have been won in 31 states; since 2000, there have been 145 exonerations.

• 15 of the 208 people exonerated through DNA served time on death row.

• The average length of time served by exonerees is 12 years. The total number of years served is approximately 2,558.

• The average age of exonerees at the time of their wrongful convictions was 26.

Of the 208 exonerees:

125 African Americans
58 Caucasians
19 Latinos
1 Asian American
5 whose race is unknown

• The true perpetrators have been identified in 77 of the DNA exoneration cases.

• Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused.

• In more than 25 percent of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted during the criminal investigation (the study, conducted in 1995, included 10,060 cases where testing was performed by FBI labs).

• 45 percent of exonerees have been financially compensated. 22 states, the federal government, and the District of Columbia have passed laws to compensate people who were wrongfully incarcerated. Awards under these statutes vary from state to state.

• 33 percent of cases closed by the Innocence Project were closed because of lost or missing evidence.

Leading Causes of Wrongful Convictions
These DNA exoneration cases have provided irrefutable proof that wrongful convictions are not isolated or rare events, but arise from systemic defects that can be precisely identified and addressed. For more than 14 years, the Innocence Project has worked to pinpoint these trends.

Mistaken eyewitness identification testimony was a factor in 77 percent of post-conviction DNA exoneration cases in the U.S., making it the leading cause of these wrongful convictions. Of that 77 percent, 48 percent of cases where race is known involved cross-racial eyewitness identification. Studies have shown that people are less able to recognize faces of a different race than their own. The Innocence Project has adopted a series of guidelines to improve the reliability of eyewitness identifications. These suggested reforms are practiced in the state of New Jersey, large cities like Minneapolis and Seattle, and several smaller jurisdictions.

Lab error and junk science have played a role in 65 percent of wrongful convictions.
In over half of DNA exonerations, the misapplication of forensic disciplines—such as blood type testing, hair analysis, fingerprint analysis, bite mark analysis, and more—has played a role in convicting the innocent. In these cases, forensic scientists and prosecutors presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury which led to the wrongful conviction. Three cases have even involved erroneous testimony about DNA test results.

False confessions and incriminating statements lead to wrongful convictions in 25 percent of cases. More than 350 jurisdictions now record interrogations.
False confessions are another leading cause of wrongful convictions. Twenty-five percent of cases involve a false confession or incriminating statement made by the defendant. Of those cases, 35 percent were 18 or under and/or developmentally disabled. The Innocence Project encourages police departments to electronically record all custodial interrogations in their entirety in order to prevent coercion and to provide an accurate record of the proceedings. More than 350 jurisdictions have voluntarily adopted policies to record interrogations. State supreme courts have taken action in Alaska, Massachusetts, Minnesota, New Hampshire, New Jersey, and Wisconsin. Illinois, Maine, New Mexico, and the District of Columbia require the taping of interrogations in homicide cases.

Snitches contribute to wrongful convictions in 15 percent of cases.
Another principal factor in wrongful convictions is the use of snitches, or jailhouse informants. Whenever snitch testimony is used, the Innocence Project recommends that the judge instruct the jury that most snitch testimony is unreliable as it may be offered in return for deals, special treatment, or the dropping of charges. Prosecutors should also reveal any incentive the snitch might receive, and all communication between prosecutors and snitches should be recorded. Fifteen percent of wrongful convictions that were later overturned by DNA testing were caused in part by snitch testimony.